

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of)

The Petition of the Inmate)
Calling Services Providers Task)
Force for Declaratory Ruling)

RM-8181

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE CLERK

COMMENTS OF THE NYNEX TELEPHONE COMPANIES

The NYNEX Telephone Companies ("NTCs") hereby comment on the Petition for Declaratory Ruling filed by the Inmate Calling Services Providers Task Force of the American Public Communications Council ("APCC"). APCC seeks a declaratory ruling that: (1) inmate-only public phones are customer premises equipment ("CPE"); and (2) certain inmate-only services offered by local exchange carriers ("LECs") are enhanced services. For the reasons set forth below, APCC's Petition should be denied.

I. THE ISSUES RAISED BY APCC'S PETITION ARE ALREADY BEING CONSIDERED BY THE COMMISSION.

The Commission is currently considering a Petition for Declaratory Ruling filed by the Public Telephone Council ("PTC") in 1988. PTC requested that the Commission declare that LEC public telephones are CPE -- the exact issue raised

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here by the APCC. The Commission should not deal with this issue in a piecemeal fashion. The Commission should defer action on the APCC Petition pending its resolution of the PTC proceeding.¹

II. INMATE-ONLY PHONES ARE NOT MATERIALLY DIFFERENT FROM OTHER PUBLIC PHONES.

APCC argues that LEC public telephones used only to provide service to prison inmates are different from public telephones used to provide service to other members of the public. As shown below, APCC's arguments on this issue are without merit.

First, APCC argues that inmate-only phones are not available to the "transient, mobile public". That is true, but the same holds true for many other public telephones. Many "public" phones are only available under controlled conditions to certain segments of the public. For example, public telephones located on military bases are not available for use by the general public, but only for use by members of the public that are permitted on the base. The same is true for public phones in employees-only areas of factories, hotels and other workplaces.

APCC also argues that inmate-only phones should be treated as CPE because telephones in hotel, hospital and university rooms are treated as CPE. APCC is comparing apples

¹ For example, if the Commission decides to initiate a rulemaking proceeding in response to the PTC Petition, it could seek comment on the issues raised by APCC with respect to inmate services as part of that proceeding.

to oranges. Prisoners do not have phones in their cells. The more appropriate comparison is to the public phones located in hospitals, hotels and universities. Such phones are not treated as CPE. Neither should inmate-only phones.

APCC next argues that the Commission has already recognized that inmate-only phones are different from other public phones. APCC relies on the Commission's April 15, 1991 decision implementing the provisions of the Telephone Operator Consumer Services Improvement Act of 1990 ("TOCSIA").² However, the Commission there was considering whether prison institutions must make 10XXX dialing available to inmates. The Commission concluded that there were "exceptional" circumstances which warranted that inmate-only phones be exempted from this requirement. There is nothing in the Commission's decision which suggests that the Commission intended to change its long-standing policy that such phones are not CPE.

III. INMATE-ONLY PHONES SHOULD NOT BE TREATED AS CPE.

In its 1980 Second Computer Inquiry decision, the Commission determined that LEC public phones should be excluded from the definition of CPE.³ Over the last 13 years, the

² See Policies and Rules Concerning Operator Service Providers, 6 FCC Rcd 2744 (1991).

³ In the Matter of Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), 77 FCC 2d 384, 447 n.57 (1980).

Commission has repeatedly reaffirmed this decision.⁴ In Tonka Tools, the Commission explained why public telephones should not be treated as CPE:

"[T]he primary customer of . . . pay telephone equipment . . . is . . . the general public or some segment thereof. As to these customers or users the telephone instrument and line are necessarily integrated. The user of these devices pays a single charge in order to place a call from a pay telephone at a public or semi-public location. The instrument and the pay telephone service are not severable from that customer's perspective. Although free to choose another location from which to place his call, the customer cannot separately select, combine or pay for the terminal device and transmission line which are used to make the call." 58 RR 2d at 910 (emphasis added).

In this respect, inmate-only phones are no different than other public phones. The user of a public phone does not separately select or pay for the use of the public telephone equipment. The same holds true for the users of inmate-only phones. They, too, do not separately select or pay for the use of the equipment.

APCC also argues that because LECs sometimes place equipment (such as processors) between the inmate-only phones and the network, such phones must be treated as CPE. Under the Commission's rules, however, all equipment used to provide LEC

⁴ See, e.g., In the Matter of Petition for Declaratory Ruling of Tonka Tools, Inc., 58 RR 2d 903 (1985); In the Matter of Procedures for Implementing the Detariffing of Customer Premises Equipment and Enhanced Services, 3 FCC Rcd 477, 479 (1988).

public telephone services is considered part of the regulated network.⁵

IV. INMATE-ONLY SERVICES ARE NOT ENHANCED SERVICES.

APCC argues that some specialized services provided at inmate-only phones are enhanced and must be offered on an unregulated basis. APCC's argument is without merit.

Enhanced services are services offered over common carrier transmission facilities used in interstate communications which:

1. employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information;
2. provide the subscriber additional, different or restructured information; or
3. involve subscriber interaction with stored information.⁶

Basic services, on the other hand, involve the "offering of a transmission capacity between two or more points suitable for a user's transmission needs."⁷ A service is "adjunct" to basic if the service facilitates the provision of basic service without altering its fundamental character.⁸

⁵ See Tonka Tools, *supra*, 58 RR 2d at 905; 47 CFR § 68.2(a)(1).

⁶ See 47 CFR § 64.702(a).

⁷ See North American Telecommunications Association, 101 FCC 2d 349, 358 (1985) ("NATA Centrex Order").

⁸ Id. at 360.

In its Computer III, Phase II Order, the Commission ruled that:

"[A]ny code or protocol conversions (or any other computer processing functions) taking place before end-to-end communications have been established or after they have been completed, while a subscriber is interacting only with the network, would be considered to be basic services."⁹

The Commission indicated that the enhanced services category does not apply to communications between a subscriber and the network itself for call setup, call routing, call cessation, calling or called party identification, billing and accounting.¹⁰

It is clear that the inmate-only services described by APCC are not enhanced. To the extent that there is any interaction with stored information, the purpose of this interaction is to facilitate the establishment of a transmission path over which the prison inmate may complete a call. The information that is provided by these specialized services is simply for the purpose of permitting a call to take place. There is no change in the form of information sent or received between inmates and the called parties. For these reasons, such services should not be regarded as enhanced

⁹ See Amendment of Section 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry), 104 FCC 2d 958, 1107 (1986).

¹⁰ See also Amendment of Section 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry), 2 FCC Rcd 3072, 3081 (1987) (the "Computer III, Phase II Order").

services but rather should be regarded as an adjunct to basic public telephone service.¹¹

V. THERE IS SIGNIFICANT COMPETITION FOR INMATE-ONLY SERVICE.

APCC argues that the current rules governing the provision of LEC public phones must be changed in order to give its members a chance to compete against the LECs on a more "level playing field." Petition at 18. APCC argues that the LECs are able to offer correctional facilities significantly higher commissions than its members can afford.

In the NYNEX region, there is vigorous and growing competition for provision of inmate-only phone service. For example, since second quarter 1990, there have been 13 Requests for Proposals (RFPs) issued by correctional facilities in New England. These 13 facilities had a total of 760 inmate-only phones. Private payphone providers won 7 of these contracts, replacing 291 NET public phones. There are two other RFPs outstanding which encompass 984 additional phones, nearly 1/2 of the 2,100 inmate-only phones served by NET. New York Telephone ("NYT") is facing similar competition. In 1992, the New York State prison system replaced approximately 2,000 NYT

¹¹ APCC contends that the use of PIN numbers to track calls made by inmates is equivalent to the Customer Dialed Account Recording ("CDAR") feature which the Commission found to be an enhanced service in the NATA Centrex Order. This is not the case. The PIN numbers are used to determine whether the inmate will be permitted to complete a call and thus is "adjunct" to basic service. The CDAR feature, on the other hand, was used to facilitate the billing of a call, and not for the purpose of allowing the call to be made.

public phones with private payphones, representing 39% of the inmate-only phones in service.

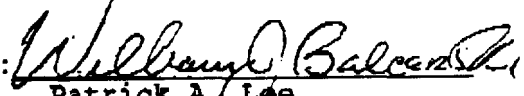
In Tonka Tools, the Commission found that allowing the BOCs to continue to offer integrated public telephone service would not present any serious threat to the viability of COCOT providers.¹² The above facts clearly demonstrate that this conclusion was correct.

VI. CONCLUSION

For the foregoing reasons, the Commission should deny APCC's Petition for a Declaratory Ruling. Alternatively, the Commission should defer action on the Petition pending its resolution of the PTC proceeding.

Respectfully submitted,

New York Telephone Company
and New England Telephone
and Telegraph Company

By: 
Patrick A. Lee
William J. Balcerski

120 Bloomingdale Road
White Plains, New York 10605
(914) 644-2032

Their Attorneys

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¹² See Tonka Tools, supra, 58 RR 2d at 911 n.32.